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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968.

No. 1179

UNION TANK CAR COMPANY,
Petitioner,

vs.

UNITED STATES OF AMERICA, EX REL., MOSHER STEEL COMPANY, FLUOR CORPORATION, LTD., ET AL., AND WARD INDUSTRIES CORPORATION,
Respondents.

REPLY BRIEF OF PETITIONER, UNION TANK CAR COMPANY.

FRANCIS J. MCCONNELL,
JOHN BORST, JR.,
ROBERT A. MAY,
Attorneys for Petitioner.

Of Counsel:
McCONNELL, CURTIS, MAHON & BORST,
134 South LaSalle Street,
Chicago, Illinois 60603,

MAY, DEES AND NEWELL,
706 Arizona Land Title Building,
Tucson, Arizona 85701.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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1. No Fact Disputes Are Raised by the Certiorari Petitions.

The Union certiorari petition, and in our view the Fluor and Ward petitions as well, involve no "last-ditch effort to reopen fact disputes" (Mosher Br. 4). They rather present straight-forward legal questions which can be determined on undisputed documentary evidence without disturbing any fact findings below.

The Sec. 23(g) bankruptcy issues, for example, may be resolved with reference to little more than Mosher's proof of claim in the IMI bankruptcy (Union Ex. E; R. 1236, 676-9), the Referee's distribution order (Union Ex. D; R. 680-1), and the pleadings in the instant case (R. 268-80).

The inconsistency between Mosher's legal position in the bankruptcy proceeding and in the Courts below is further substantiated, not contradicted, by the District Court's finding that Mosher filed its claim *against IMI* and not the joint venture (Findings 52 and 53, Union Pet. App. B, p. 20).

Similarly, a purely legal issue is presented with respect to Union's status as a surety. The fact finding that Union was a co-obligor directly liable to pay one and the same debt as Ward (Finding 35, Union Pet. App. B, p. 14), did not warrant the automatic conclusion that no principal-surety relationship could exist between Ward and Union which relationship would entitle Union to equitable relief under Ariz. Rev. Stat. § 12-1642. Moreover, this question is again predicated upon, not contradicted by, the findings made by the District Court respecting the dual liability of Union and Ward (Findings 40 & 42, Union Pet. App. B, pp. 16, 17). Mosher's argument about re-opening complicated fact disputes therefore is a red herring intended to divert attention from the merits of the legal questions presented.

2. Mosher's Inconsistent Claims Secured for It a Distribution in Violation of the Bankruptcy Act, Sec. 23(g).

Mosher states that "Like Ward, Union simply refuses to admit that the claim made by Mosher in the reorganization fully set forth the fact that its claim against IMI was *in its entirety the same claim* which Mosher asserted against Ward *as IMI's joint venturer*" (Mosher Br. 7). Union most emphatically does so refuse to admit because Mosher's claims are not the same but are necessarily made different and distinct by the provisions of Section 23(g). Under that Section a "claim against IMI" must be based on an *individual* obligation of the debtor which, if established, authorized Mosher's payment out of individual assets of the

debtor's estate. A claim against the joint venture would constitute a partnership claim which would have entitled Mosher to payment out of joint venture assets—property which was non-existent in the IMI bankruptcy proceeding. Mosher did not file a proof of claim against IMI "as a joint venturer" although it did purport to reserve its rights against Ward in that capacity. Its actual proof of claim, asserted in the *individual* Chapter XI bankruptcy proceeding of Idaho-Maryland Industries, a Nevada corporation, Debtor, affirmed that IMI, *individually,* was "justly and truly indebted to the plaintiff corporation" (Finding 52, Union Pet. App. B, p. 20; R. 676).

Moreover, the inconsistency in Mosher's claim positions was in no way justified by the co-debtor provisions of Bankruptcy Act, Sec. 16, 11 U. S. C. § 34. That section merely provides that the liability of a person who is a co-debtor with a bankrupt will not be altered by the discharge of the bankrupt. It would have been applicable in the instant case had Mosher originally asserted in the IMI bankruptcy that IMI-Ward and Union were co-debtors and had sought recovery against IMI only in its capacity as a joint venturer. Had it maintained that position, Mosher most assuredly would have received no bankruptcy distribution but its claims against Ward as a joint venturer and against Union would not be barred by estoppel or by IMI's bankruptcy discharge.

3. The Decision Below Nullified the Arizona Statutory Remedy for Sureties.

Mosher merely reiterates the Court of Appeals' conclusion that Union, as a co-obligor with a "direct" liability to plaintiff, was necessarily precluded from being considered a surety within the meaning of the Arizona statute. Respondent, like the Court below, thereby assumes that Union's surety status depended upon the nature of its

obligation to Mosher rather than upon the relationship between Union and Ward with respect to the debt concerned. This position is maintained in the face of long-settled law holding that whether a party is a surety "depends not upon his relation to the obligee, the creditor, but upon his relation to the principal obligor, the debtor." 10 *Williston on Contracts* (3rd Ed. 1967), § 1211, p. 683.

Commenting on this issue, the Restatement authors observe in *Rest. Security* § 82, Comment h:

> ". . . Finally, a tripartite relationship [i.e., between co-debtors and creditor] involving a primary and secondary liability may arise in a variety of other situations in which the person, who in final analysis has a secondary liability, *nevertheless has contracted for a primary liability so far as the creditor is concerned* . . .
>
> "None of these situations belongs solely to the field of suretyship. They are properly included in such a category because of the application to them of many similar rules. *The most important of these rules relate . . . to the limitations upon the freedom of action of the creditor in dealing with the principal whenever he has knowledge of the existence of the tripartite situation.*" (Emphasis supplied.)

See also *Rest. Security* § 114 Comment a, stating that "Where the creditor deals with two persons as principals" but has knowledge of their surety relationship *inter se*, "he must take account of the relationship in his dealings with them."

The District Court's findings clearly support the conclusion that Mosher was aware of the surety relationship between Union and Ward from the inception of the transaction.* It found that when Orr offered joint venture pur-

* Note that A. R. S. § 12-1642 does not expressly require that the creditor have knowledge of the surety relationship as a condition to the surety obtaining statutory relief. Commenting on such statutes the Restatement authors observe, "Some states by statute require

chaser orders at the October 23rd meeting, Mosher agreed to accept them provided that Union would also be responsible for payment (Finding 29, Union Pet. App. B, p. 12). It also found that during the telephone conversation with Page, Moore insisted that Union pay Mosher directly in the event the joint venture did not pay within the terms of the sale (Finding 31, Union Pet. App. B, p. 13). Mosher thus had actual knowledge that as between the two obligors, Ward rather than Union should in the first instance pay for the work performed. When these circumstances are combined with the fact that Ward, as a joint venturer, had expressly agreed to indemnify Union on materialmen's claims (Jt. Ex. 8, R. T. 218) and had already received Union's payment for Mosher's work (See Union Pet. pp. 7-8), we submit that Union's position as a surety was uncontrovertibly established.

Petitioner thereby became entitled to relief in accordance with the equitable principles codified in the Arizona Statute. Ariz. Rev. Stat. § 12-1642 expressly provides that where several defendants are sued for a common debt, the court on application shall determine whether "one or more of the defendants are surety of the others" and in the event a surety relationship between them is found to exist, the court shall order that plaintiff "levy the execution first upon the property of the principal" before a levy is made upon the property of the surety. This statutory remedy extends to every form of suretyship "whether created by express contract or operation of law." See Ariz. Rev. Stat. § 12-1646. Comparable statutory provisions are also found in Texas where Mosher is situated, *Vernon's Texas Codes Ann.* (1968), *Business and Commerce Code*, §§ 34.01-34.05,

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a creditor in certain circumstances and at the formal demand of the surety to proceed first against the principal. The application of such statutes to sureties not known to be such at the beginning of the transaction with the creditor, or to sureties who have originally contracted as principals, is a matter to be determined by an interpretation of the particular statutes." *Rest., Security*, § 114, Comment d.

and in California where the Vandenburg work was performed, *West Ann. Calif. Codes* (1954), *Civil Code*, § 2845.

Commenting on this type of statutory provision in *State Athletic Comm.* v. *Mass. Bonding and Ins. Co.*, 46 Cal. App. 2d 823, 829, 117 P. 2d 75, 79 (1941), the California Appellate Court stated that it represented the "enactment of rules developed in equity to give relief from the common law doctrine which permitted the creditor to enforce remedies against the surety without reference to his rights against the principal." See also *Ferreis* v. *Matteson*, 21 Cal. 2d 437, 447, 132 P. 2d 476 (1942).

This was clearly the purpose for which Ariz. Rev. Stat. § 12-1646 was enacted, a purpose totally frustrated by the decision below.

CONCLUSION

For the reasons stated herein and in its petition, Union respectfully prays that a writ of certiorari issue to review the decision below.

Respectfully submitted,

FRANCIS J. McCONNELL,
JOHN BORST, JR.,
ROBERT A. MAY,
Attorneys for Petitioner.

Of Counsel:

McCONNELL, CURTIS, MAHON & BORST,
134 South LaSalle Street,
Chicago, Illinois 60603.

MAY, DEES AND NEWELL,
706 Arizona Land Title Building,
Tucson, Arizona 85701.